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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1284

WILLIAM EVERHARDT, ARNOLD ECKLAND, RUSSELL E. GARRETT, DOROTHY HAYES as Tutrix of EDWARD HAYES and the GREATER NEW ORLEANS MOTORCYCLE ASSOCIATION,

Appellants,

versus

CITY OF NEW ORLEANS, VICTOR H. SCHIRO and JOSEPH GIARRUSSO,

Appellees.

On Appeal from the Supreme Court of the State of Louisiana

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1968

No.

WILLIAM EVERHARDT, ARNOLD ECKLAND,
RUSSELL E. GARRETT, DOROTHY HAYES
as Tutrix of EDWARD HAYES and the
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Opinions Below

The opinion of the Civil District Court for Orleans Parish is not reported. It is found in the Appendix, *infra*. p. 12.

The opinion of the Fourth Circuit Court of Appeals, State of Louisiana is reported at 208 S.2d 423(1968), and is found in the Appendix, *infra*. p. 21.

The opinion of the Supreme Court of Louisiana is reported at ____La. ____, 217 So.2d 400(1969), and found in the Appendix, *infra*, at p. 32.

JURISDICTION

Appellants brought a declaratory judgment proceeding in the Civil District Court for Orleans Parish attacking the validity of City of New Orleans Ordinance No. 3536 as being in conflict with the United States Constitution. The pertinent portion of the ordinance in question requires that operators of motor-driven cycles wear helmets on their heads.

The trial court upheld the constitutionality of the ordinance on July 13, 1967, and an appeal by plaintiffs followed.

The Fourth Circuit Court of Appeals for Louisiana held the ordinance unconstitutional on March 4, 1968 and specifically found the ordinance violative of the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and beyond the police power of the City or State.

The Supreme Court of Louisiana on December 16, 1968, reversed the Court of Appeals and held (4-3) the ordinance did not violate the U.S. Constitution. Justices Barham, Summers and Hamiter dissenting.

On January 20, 1969, the Supreme Court of Louisiana refused rehearing (4-3), Justice Barham, Summers and Hamiter dissenting.

The judgment of the Supreme Court of Louisiana was made final on January 20, 1969, and notice of appeal was filed April 10, 1969.

This Court has jurisdiction under Title 28 U.S. Code Sec. 1257(2), See also: *Breard v City of Alexandria, La.*, 341 U.S. 622, 71 S.Ct. 920 (1951).

STATUTE INVOLVED

Ordinance No. 3536, City Code Sections 38-228 et seq reads in part as follows:

No. 3536 MAYOR COUNCIL SERIES

> AN ORDINANCE to amend Sections 38-116, 38-223(b) and 38-225, and to add Sections 38-228.1, 38-228.2 and 38-231(f) items number 94 and 95 of Chapter 38 of Ordinance Number 828 M.C.S., known as the Code of the City of New Orleans, providing additional safety regulations and equipment requirements for motorcycles and motor driven cycles and penalties for violations thereof. . . . .

SECTION II. That Sections 38-228.1, 38-228.2 and 38-231(f) items number 94 and 95 be and the same is added to read as follows:

> Section 38-228.1. Required Equipment for Motorcycles and Motor Driven Cycles.
>
> . . .

(c) *Headgear:* No person shall operate or ride upon any motorcycle or any motor driven cycle unless such person is equipped with and wearing on the head, a safety helmet of the type and design manufactured for use by the operators of such vehicles, which shall be properly secured with a chin strap while the vehicle is in motion. All safety helmets shall consist of lining, padding and chin strap.

.....

Section 38-228.2. The operator of any motorcycle or motor driven cycle shall be responsible for all violations incurred by his passengers.

Section 38-231(f) Item number 94. Required equipment for operator and passenger on a motorcycle or motor driven cycle.

	[Offense]		
(228.1(c).)	1st	2nd	3rd
	$15.00	$25.00	Court

Item number 95. Required equipment for motorcycle and motor driven cycle. (228.1(a)), 228.1(b), 228.1(d))

1st	2nd	3rd
$5.00	$7.50	$10.00

THE QUESTION PRESENTED

Whether the States or the Cities have the authority to compel the wearing of apparel, i.e. helmets, on only a certain segment of the motoring public, viz., motorbike operators.

A. Whether the helmet requirement violates the due process and equal protection clauses of the U.S. Constitution-Fourteenth Amendment.

B. Whether the helmet requirement violates the Ninth and First Amendments of the United States Constitution.

C. Whether the police power of the State may be invoked where the health, welfare and safety of the public generally is not concerned.

D. Whether the Louisiana Supreme Courts judicial notice of facts dehors the record denied appellants due process.

STATEMENT OF THE CASE

Plaintiffs-appellants are taxpayers and residents of the City of New Orleans and motorbike operators. They brought suit, individually, and, as a class, to declare the City Ordinance requiring that all operators of motorbikes wear helmets, unconstitutional as abridging their freedom of expression, right to be left alone, the equal protection and due process clauses of the Fourteenth Amendment. (R-5).

The City of New Orleans, enforces the said ordinance under criminal penalties. (R-14 at 17)

The District Court decided all claims against plaintiff-appellants. The Court of Appeals held the ordinance unconstitutional on points raised by plaintiff-appel-

lants. The Supreme Court of Louisiana reversed and held the Ordinance constitutional. The Supreme Court of Louisiana in its opinion made findings of fact dehors the record relative to the safety of motorcycles and propensity to be involved in accidents. Appellants objected, through their petition, for rehearing, to the Supreme Court going beyond the record to justify the use of the police power. Each decision in length rested on the federal constitutional grounds hereinafter pointed out. Appellants raised the federal questions in their initial petition. Record 5 at pg. 8 *et seq.*

THE QUESTION IS SUBSTANTIAL

1. This case is novel in the sense that the City of New Orleans has required a certain segment of the population to wear a definitive type of wearing apparel. Usually regulations such as this are enacted under the requirement that the vehicle have certain equipment attached to it, e.g. safety belts in automobiles and life preservers on boats. The government of New Orleans sees fit to decide what people wear. After *A.M.A. v. Davids,* 9 Mich. App. 655, 158 N.W. 2d 72(1968), held the Michigan statute unconstitutional, the state legislature amended the statute so as to require only the vehicle to have the helmet attached to it for use by operators if they so desired. See *Mich. Stat. Ann.* Sec. 9.2358 (Supp. 1968) as amended Pub. Act. No. 141 (June 2, 1968). See also *Ark. Stat. Ann.* Sec. 75-1703(2) (a) (Supp. 1967).

Two state's Attorney Generals have ruled such statutes unconstitutional. *Op. Atty. Gen.* New Mexico, No.

66-15 (Feb. 1, 1966) and *Op. Atty. Gen.* Oklahoma No. 68-267(Dec. 31, 1968).

Supreme Courts of Rhode Island and Massachusetts have ruled such statutes constitutional. See *Rhode Island v. Lombardi,* ____ R. I. ____, 241 A.2d 625 (1968); *Mass. v. Howie* ____ Mass. ____, 238 N.E. 2d 373 (1968), cert. den. 89 S.Ct. 485, 21 L.Ed. 2d 464 (1968).

All decisions and opinions interpret the statutes in light of the U.S. Constitution, and appellants submit the state of the law is confused in absence of a determination by the U.S. Supreme Court. See *Comment,* 73 Dickenson L. Rev. 100 (1968); *Note,* 67 Mich. L. Rev. 360 (1968).

2. Equal protection requires that classification must "always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily, and without any such basis. . . arbitrary selection can never be justified by calling it classification." *Gulf v. Ellis,* 165 U.S. 150, 155, 17 S.Ct. at 258 cited and quoted with approval in *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 287 (1965). See also *Levy v. State,* 391 U.S. 68, 88 S.Ct. 1509 (1968); *Glona v. Amer. Guar.,* 391 U.S. 73, 88 S.Ct. 1515 (1968).

The record herein reflects that the purpose of the ordinance is safety, yet the record is devoid of one iota of testimony or proof that the use of helmets stops accidents. The proof is to the contrary.

> ". . . this record contains not one word which indicates that the safety of the general public is to the slightest extent favorably affected by the wearing of helmets by motorcycle drivers. In fact, the record indicates the contrary. . ." *Everhardt v. City of New Orleans,* 208 S.2d 423, 427, (CT. APP. LA., Janvier, concurring.)

The salient factor is that automobile drivers are excluded from the penal ordinance although they are just as prone to head injuries once the accident occurs. R. 25A. This ordinance demonstrates the prohibited underinclusiveness of *Skinner v. Oklahoma,* 316 U.S. 535, 65 S.Ct. 1110 (1942). See also concurring opinion of Mr. Justice Jackson in *Rwy Exp. v. N.Y.,* 336 U.S. 106, 69 S.Ct. 463, 468 (1949).

> "As a matter or principle. . .I do not think difference of treatment under law should be approved on classifications because of differences unrelated to legislative purpose." *Ibid.* See also *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344 (1957); *Smith v. Cahoon,* 283 U.S. 553, 51 S.Ct. 582 (1931); *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 670 (1954)

3. The Ninth Amendment of the Federal Constitution and Article I, Sec. 15 of Louisiana's are to the same effect. *All rights not given to government are retained by the people.* Because the type of infringement here is difficult to classify — it probably can best be construed as forced expression. Appellants maintain that the area of dress, i.e. what one wears, or

not wears, on his head is a matter of personal right and privilege. There is no state interest in this case. Wearing helmets doesn't reduce the incidence of accidents.

"The exercise of the police power can be justified only when it adds, in a substantial way, to the security of the fundamental rights." *Meyer v. Nebraska,* 262 U.S. 390, 392, 43 S.Ct. 625 (1923); *West Va. v. Barnett,* 319 U.S. 624, 63 S.Ct. 1178 (1943).

The Ninth Amendment should lend "strong support to the view that the liberty protected. . .is not restricted to rights specifically mentioned in the first eight amendments." *Griswold v. Conn.,* 381 U.S. 479, 493, 85 S.Ct. 1678 *(concurring opinion,* 1965). Although this case certainly falls under the traditional concept of due process; the personal liberty involved also makes the Ninth Amendment pertinent. As government becomes modern, it tends to enter areas of personal life that may not have been traditionally recognized under the first eight amendments, but those areas are just as deserving of protection against infringement that may be subtle, perhaps, and even well-meaning, but nevertheless, devastating, insidious and complete. Jeremy Bentham, in his Works, summed it up:

> "To impose restraints upon the individual for his own welfare, is the business of education... It is rarely the duty of the legislator towards his people." See also Patterson, *"The Forgotten Ninth Amendment* (1955); Abrams, *What*

are the Rights Guaranteed by the Ninth Amendment? 53 A.B.A.Jour. 1033 (1967)

4. The police power cannot be used where there is no public interest involved. At best, the wearing of a helmet only serves to mitigate the possible injuries once the accident occurs. This Court has never allowed the State to regulate the user's private business on the highways merely on the pretense that it is regulating the use of highways. See *Smith v. Cahoon,* 283 U.S. 553, 51 S.Ct.582 (1931).

> "To justify the State in thus interposing of its authority in behalf of the public, it must appear, *first,* that the interests of the public generally, as distinguished from those of a particular class, require such interference; and *second* that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." *Lawton v. Steele,* 152 U.S.133, 14 S.Ct. 499 (1894).

The Supreme Court of Louisiana, in its opinion in this case, sought to justify the legislation by saying that the helmet ordinance promotes safety to the cyclist as well as others and that motorcycles constitute a greater traffic hazard than other vehicles. 217 S.2d 400, at p. 403. These reasons had no basis in the Record. Such reaching outside the record deprived appellants of the fair hearing they were entitled to. For the Court to make such a finding, it would have had to take judicial notice of the facts recited. As dissenting Justice Barham said:

> "The conclusions which the majority has made to supply constitutionality to this ordinance are not supported by the sparse record, so it must be assumed that these conclusions are in the nature of judicial notice." 217 S.2d. 400, 404.

Such a tactic is violative of due process, *Chicago M. & St. P. Rwy Co. v. Polt*, 232 U.S. 165, 168, 34 S.Ct. 301 (1913); *Ohio Bell Tel. v. Pub. Util. Comm.*, 301 U.S. 292, 57 S.Ct. 724 (1937).

CONCLUSION

For the reasons stated, a substantial question under the Constitution, is presented in this case, and jurisdiction should be noted.

Respectfully Submitted:

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April, 1969

APPENDIX

(UNREPORTED)

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS, STATE OF LOUISIANA
DIVISION "C"

NO. 463-827 DOCKET #5

WILLIAM EVERHARDT
ARNOLD ECKLAND
RUSSELL E. GARRETT
DOROTHY HAYES as Tutrix of EDWARD HAYES, JR., GREATER NEW ORLEANS MOTORCYCLE ASSOCIATION

vs.

CITY OF NEW ORLEANS,
VICTOR H. SCHIRO
JOSEPH GIARRUSSO

JUDGMENT

This matter came for trial on July 10, 1967, and was submitted for adjudication.

PRESENT:
WILLIAM WESSELL,
MICHAEL O. MIRANNE,
Attorneys for Plaintiffs
MAURICE B. FRIEDMAN,
Attorney for Defendants

When, after hearing the pleadings, evidence and argu-

ment of counsel, and for the written reasons assigned: IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Defendants, City of New Orleans, Victor H. Schiro and Joseph Giarrusso and against the Plaintiffs, William Everhardt, Arnold Eckland, Russell E. Garrett, Dorothy Hayes as Tutrix of Edward Hayes, Jr., Greater New Orleans Motorcycle Association, the Court holding that Ordinance No. 3536, Mayor Council Series, is constitutional, thereby dismissing Plaintiffs' suit at their costs.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT THIS 13th DAY OF JULY, 1967.

/s/ RICHARD J. GARVEY
JUDGE

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS, STATE OF LOUISIANA
DIVISION "C"

NO. 463-827 DOCKET #5

WILLIAM EVERHARDT
ARNOLD ECKLAND
RUSSELL E. GARRETT
DOROTHY HAYES as Tutrix of EDWARD HAYES, JR., GREATER NEW ORLEANS MOTORCYCLE ASSOCIATION

vs.

CITY OF NEW ORLEANS
VICTOR H. SCHIRO
JOSEPH GIARRUSSO

REASONS FOR JUDGMENT

Plaintiffs have brought this class action seeking to have Sections 38-228.1 (c), 38-228.2 and 38-231 (f) Item No. 94 of the New Orleans City Code as amended, declared void and unconstitutional. The ordinances in question require all operators of the motor driven cycles to wear safety helmets while operating or riding the cycle. It is the contention of the plaintiffs that these ordinances are invalid on their face and violate the Constitution of the United States and that of the State of Louisiana.

The first argument brought forth by counsel is that the title of the ordinances are contrary to the required form as set forth in Article 3, Section 16 of the Louisiana Constitution and the Home Rule Charter of the City of New Orleans. This Section of the Louisiana Constitution requires that the title be indicative of the single object embraced by the Act. The City Charter, Section 3-112 cited by the plaintiffs does not deal with title requirements of ordinances and no such provision has been found. This Constitutional provision has reference only to State Statutes and not municipal ordinances. See *City of New Orleans v. Pergament*, 198 La. 582, 5 So. 2d. 129, (Sup. Ct. 1942), *State v. Monsour*, 205 La. 272, 17 So. 2nd. 307, (Sup. Ct. 1944).

The municipal ordinance in question is described by the plaintiffs as being too vague to be put into application without violating due process of law and thus, should be declared inoperative. The United States Supreme Court in *Yu Cong Eng v. Trinidad*, 271 U.S. 500,

46 S. Ct. 619, 70 L. Ed. 1059, recognized the doctrine that a statute which requires the doing of an Act may be held to be in violation of due process of law due to vagueness. The test as applied by the United States Supreme Court is whether the Act is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. See *Connolly v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (cases cited). In applying this test to that section of the New Orleans City Code concerning safety helmets, there is no difficulty in ascertaining its meaning. The Ordinance states that all persons operating or riding a motorcycle must wear "a safety helmet of the type and design manufactured for use by the operators of such vehicles, . . . All safety helmets shall consist of lining, padding and chin strap. Section 38-228.1 (c)." [From the testimony heard by the Court there appears to be two designs manufactured; one is the competition helmet worn for racing and the other is the half helmet worn for ordinary riding. These are manufactured by many different companies, but the styling is basically the same. It is clear to the Court that these two helmets are what is referred to in the Ordinance and not the others exhibited or described to the Court, such as construction hard hats and pith helmets.]

Plaintiffs urge that the Ordinances are in conflict with and go beyond the scope of State law on the subject. The jurisprudence clearly delineates the circumstances in which a municipality may legislate in such instances.

> "A municipality cannot permit by ordinance what a statute forbids, or forbid what a statute expressly permits, but it may supplement a statute or cover any part of an authorized field of local legislation that is not covered by State legislation." *State ex rel* Sutton v. Caldwell, 197 So. 214, 217, 195 La. 507, (Sup Ct. 1940). See also *City of Baton Rouge vs. Rebowe,* 226 La. 186, 75 So. 2d 239 (Sup. Ct. 1954); *City of Shreveport vs. Provenza,* 231 La. 514, 91 So. 2d 777, (Sup. Ct. 1956)

The two requirements, then, are that there be no conflict with State legislation and that the municipality has the authority to pass such legislation. As pointed out by plaintiffs' petition, L.S.A. - R.S. 32, which deals with State legislation of motor vehicles and traffic regulation, makes no provisions whatsoever as to safety helmets. The municipality was then free to act and has not enacted an ordinance which conflicts with the legislation of the State.

It has been suggested to the Court that the scope of the municipality's authority is limited to those areas enumerated in L.S.A. - R.S. 32:41. A study of Title 32 in its entirety reveals this not to be the case. The topics of L.S.A. - R.S. 32:41 are a compilation of those dealt with throughout the title and its purpose is to set out clearly that even in these areas where the State has legislated, local municipal authorities may act so long as their actions do not conflict with the State legislation.

The City of New Orleans has been given subordinate authority by its city charter to legislate in Home Rule Charter, Article II, Section 2-101 (4). This grants to the City the power "to adopt and enforce local police, sanitary and similar regulations . . . which are necessary or proper in the legitimate exercise of its corporate powers and municipal functions." Under its police power then, the City of New Orleans may pass ordinances regulating traffic covering additional matters not covered by, nor in conflict with, State statutes. *Lowenberg v. Fidelity Union Casualty Co.*, 147 So. 81, (2nd Cir. 1933).

It is also contended by plaintiffs that the requirement of wearing a safety helmet is unreasonable and, in fact, creates a danger. The testimony given to the Court was that the wearing of helmets impaired the wearer's hearing and peripheral vision and that the helmets were costly and uncomfortable. However, the impairment of sight and hearing were shown only with the competition type helmet and not the half helmet. The ordinance allows either to be worn. So, the wearer who finds these handicaps with the competitive helmet may choose the half helmet. As to the personal discomfort, this can hardly be said to create a danger. When the scales must measure between safety and discomfort, the former far outweighs the latter. The argument of costliness is also without merit as the evidence showed that safety helmets could be purchased for a nominal sum. An ordinance cannot be rendered invalid merely because particular persons find it hard or burdensome to comply. See *Grant vs. Oklahoma City*, 289 U.S. 98,

53 S. Ct. 530, 77 L. Ed. 1058, *Standard Oil Co. vs. Marysville,* 279 U. S. 582, 49 S. Ct. 430, 73 L.Ed. 856.

The enforcement of the ordinances is argued to be discriminatory in that it is not enforced against United States postmen or golf-cart operators. The ordinances, however, make no specific exemption of these groups. Further, it is not presently before the Court whether or not such persons are included within the class concerned. If they are, and if the ordinance is not being enforced against them, which was not sufficiently proved, this is no basis for holding the ordinances unconstitutional. The improper administration of an otherwise valid law cannot jeopardize its standing. See *Reagan v. Farmers Loan & T. Co.,* 154 U.S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014, 12 Am. Jur. "Constitutional Law" Sec. 566, pages 257, 258; as cited in *La. St. Bd. of Med. Exam. v. Beatty,* 55 So. 2d 761, 764, n. 3, 220 La. 1 (Sup. Ct. 1951)

As pointed out by plaintiffs, all that is required by the equal protection clause of the Fourteenth Amendment of the United States Constitution is that it affect alike all persons similarly situated and only those persons. Plaintiff compares the case at bar with *Skinner v. Oklahoma,* 316 U.S. 535 (1942) to illustrate that the ordinances in question are both over inclusive and under inclusive. However, there is one major difference ignored by the plaintiffs. In *Skinner,* the statute itself states these exclusions. In Sections 38-228.1 (c), 38-228.2 and 38-231 (f) Item No. 94 no exclusions are made, all who operate or ride on motor driven cycles must wear

safety helmets and thus, all those similarly situated are affected by this law.

The final argument of the plaintiffs is that the ordinances are in violation of due process of law by exceeding the State's police power. Determination of this position requires consideration of the scope of the State's police. In *Schwegmann Bros. v. La. Bd. of Alcoholic Beverage Control,* 43 So. 2d 248, 216 La. 148, (Sup. Ct. 1949) the Supreme Court cites the following with approval;

> "Although constitutional guaranties cannot be trangressed, it is settled that the possession and enjoyment of all rights are subject to the police power which includes such reasonable conditions as may be deemed by the governing authority of the Country essential to the safety, health, peace, good order and morals of the community. Consequently, both persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, welfare and prosperity of the people of the State; everything contrary to the public policy or inimical to the public interest is the subject of the exercise of the power. The return for the sacrifice of private rights, however, should be the attainment of some public object of sufficient necessity and importance justly to warrant the exertion of the powers. Regulations to be valid must tend to some ulterior good to which the destruction or curtailment of rights is merely inci-

dental, 11 American Jurisprudence verbo Constitutional Law, Section 267."

This police power is applicable to Municipal authority as well as the State. In testing police power legislation, the issue is whether the restrictions on individual rights is reasonable and not whether it is a restriction. See *Schwegmann Bros. v. La. Bd. of Alcoholic Beverage Control,* supra, *State vs Birdsell,* 104 So. 2d 148, 235 La. 396, Sup. Ct. 1958). Under the ordinances before the bar, the health and safety of citizens is at stake. Not all of the citizens of the City are involved, but all within a certain class. Is it unreasonable for the City to seek to protect a group of citizens from serious or perhaps fatal injury? This Court is of the opinion that not only is it reasonable, but within the duties of the City Administration. The plaintiffs have failed to establish that the ordinances are unreasonable or arbitrary. Thus, the ordinances are found to be a valid exercise of police power and constitutional.

RICHARD J. GARVEY
JUDGE

New Orleans, La.
July 13, 1967.

(208 S.2d 423)

COURT OF APPEAL — FOURTH CIRCUIT

STATE OF LOUISIANA, No. 2977

WILLIAM EVERHARDT, ARNOLD ECKLAND, RUSSELL E. GARRETT, DOROTHY HAYES as Tutrix of EDWARD HAYES, and GREATER NEW ORLEANS MOTORCYCLE ASSOCIATION

VS

CITY OF NEW ORLEANS, VICTOR H. SCHIRO, AND JOSEPH GIARRUSSO

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, NO. 463-827, DIVISION "C", HONORABLE RICHARD J. GARVEY, JUDGE.

PAUL E. CHASEZ

JUDGE

(Court composed of Judges Louis H. Yarrut, Paul E. Chasez and George Janvier.) (Janvier, J. concurs with written reasons)

MICHAEL O. MIRANNE, WILLIAM F. WESSEL, Counsel for WILLIAM EVERHARDT, ARNOLD ECKLAND, RUSSELL E. GARRETT, DOROTHY HAYES as TUTRIX of EDWARD HAYES, and GREATER NEW ORLEANS MOTORCYCLE ASSOCIATION

PLAINTIFFS-APPELANTS.

ALVIN J. LISKA, MAURICE B. FRIEDMAN, Counsel for CITY OF NEW ORLEANS, VICTOR H. SCHIRO, AND JOSEPH GIARRUSSO.

DEFENDANTS-APPELLEES.

AFFIRMED IN PART;
REVERSED IN PART;
AND RENDERED.

Plaintiffs, one retail motorcycle dealer and a group of motorcycle riders residing in the Greater New Orleans Area, brought a class action in the Civil District Court for the Parish of Orleans, to enjoin the City of New Orleans from enforcing a penal ordinance requiring all cyclists to wear helmets while operating motorcycles within the city limits. Plaintiffs invoke this equitable remedy by asserting the ordinance is unconstitutional and that its enforcement will cause plaintiffs irreparable injury.

After defendant urged a declinatory exception to the jurisdiction of a civil court to enjoin enforcement of a penal law, but before the exception was argued, plaintiffs amended their pleadings to pray, in the alternative, for a declaratory judgment.

The City's answer averred the ordinance is a valid exercise of the police power in regulating matters concerning the public safety of its citizens.

From judgments maintaining the declinatory exception and declaring the ordinance is constitutional, plaintiffs have appealed.

Plaintiffs attack the validity of City Ordinance 3536, M.C.S., Sections 38-228.1 (c), 38-228.2 and 38-231 (f) Item No. 94. The pertinent section at issue is 38-228.1 (c) which provides:

> "*Headgear:* No person shall operate or ride upon any motorcycle or any motor driven cycle unless such person is equipped with and wearing on the head, a safety helmet of the type and design manufactured for use by the operators of such vehicles, which shall be properly secured with a chin strap while the vehicle is in motion. All safety helmets shall consist of lining, padding and chin strap."

The purpose for its enactment is to minimize head injuries to the cyclist who is involved in an accident.

While plaintiffs have leveled several attacks against the constitutionality of this ordinance, we think the most serious issue presented for our determination is whether the exercise of police power vested in a law-making body extends to forcing a citizen to protect his own well-being, or whether it is limited to regulation of individual conduct when that conduct might affect the well-being of other persons in the community.

Before discussing the constitutional question, we must dispose of plaintiffs' argument that the City has usurped a state function in passing this ordinance. They urge the City may not regulate motorcycle traffic within its corporate limits because the state has previously legislated in this field.

While it is true that the state has enacted motor vehicle and traffic regulations in the Louisiana Highway Regulatory Act (LSA-R.S. 32:1 *et seq.*), the Louisiana legislature has reserved to local authorities the power to regulate the flow of traffic within their corporate limits under their general police power. The limitation upon this power is simply that a municipality may not pass a law that modifies or conflicts with a state statute. [See LSA-R.S. 32:41 (13)]. The motorcycle ordinance is well within the limits proscribed by the state as it neither modifies nor conflicts with state law.

Having determined the City is entitled to enact traffic regulations under its general police power, we must next consider whether the ordinance at issue is a valid exercise of the police power.

An ordinance is presumed to be constitutional. In Schwegmann Bros. v. Louisiana Board, Etc. 216 La. 148, 43 So.2d 248, at p. 255 the Louisiana Supreme Court stated:

> "It is elementary that an act of the Legislature is presumed to be legal, and the judiciary is without right to declare it unconstitutional unless that is manifest. This rule is strictly observed in cases involving laws enacted in the exercise of the state's police power. Further, under certain circumstances and when validly exercised the police power may encroach upon the due process guaranteed by the state and federal constitutions. * * * "

The strong presumption of constitutionality stems from judicial recognition of the necessity to vest in lawmaking bodies sweeping powers to regulate public health, morals and safety for the good of its citizenry; however, both federal and state jurisprudence imposes some constitutional restraints on the lawmakers.

The police power of a State today embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public safety, health and morals. The police power has been extended to legislation designed to promote the greatest welfare of the State. (See Nashville C. & St.L. Ry. v. Walters, 294 U.S. 405, 55 S.Ct. 486 (1934) and Eubank v. Richmond, 226 U.S. 137, 33 S.Ct. 76 (1912).) Even with the ever increasing expansion of police power, legislation enacted under its guise must concern the interest of the public generally.

The Louisiana Supreme Court so stated in Schwegmann Bros. v. Louisiana Board, etc., *supra*, as follows:

> " 'In City of Alexandria v. Hall, 171 La. 595, 131 So. 722, 724, the following language found in State ex rel Newman v. City of Laramie, 40 Wyo. 74, 275 P.106 was quoted approvingly:
>
> " 'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; * * * * *' "

The same limitation upon exercise of the police power in enacting legislation was applied in Weinberg v. Northern Pac.Ry.Co. (8 Cir.) 150 F.2d 645. At page 651 the Court observed:

> "If the ordinance can be justified it must be on the theory that it is a reasonable exercise of the police power vested in the City. The City Council, however, may not, under the guise of protecting the public interest, arbitrarily interfere with the operation of the common carrier or impose unreasonable restrictions on its lawful calling. *To justify the legislation it must appear that the interest of the public generally, as distinguished from that of a particular class, require such interference,* and even when that condition may be said to exist, the means to accomplish the purpose must be reasonably necessary and not oppressive nor arbitrary. Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed 385; *** (other citations omitted)" (Emphasis added.)

In the instant case we must consider whether the helmet requirement meets the test of a regulation enacted to promote the safety of the public at large. The only function of the helmet requirement we are able to discern is to minimize the extent of injury to the individual cyclist involved in an accident, and not to contribute to the safety of the motoring public at large. Thus we are concerned with a limitation of the personal liberty of the individual motorcyclist.

The Fourteenth Amendment of the United States Constitution (Section 1) guarantees that no citizen will be deprived of life, liberty or property without due process of law. The *due process* clause tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty or property, which the Congress or the legislature may not withhold. The guaranty of equal protection is aimed at individual or class privilege, on the one hand, and oppression or inequality on the other. (See Truax v. Corrigan, 257 U.S. 312, at 332-333 (1921)).

In our view the helmet ordinance constitutes a denial of due process of law to plaintiffs in that it deprives them of an individual liberty without promoting a purpose beneficial to the public at large. Deprivation of personal liberty has been upheld in instances where said restriction operates to promote the public welfare. Thus compulsory vaccination laws are valid because the citizenry at large is protected from a potential smallpox epidemic (Zucht v. King, 260 U.S. 174 (1922)); however, without a valid benefit flowing to the public generally, an ordinance restricting a personal liberty of the individual is in contravention to the individual guarantees safeguarded by the due process clause.

Further, we conclude the ordinance also denies plaintiffs the equal protection of laws in that it imposes undue restrictions on one class of the motoring public without any salutary effect to the public at large. While it is true that regulations for the public safety may press with more or less weight upon one than on the

other and remain within the constitutional pale, they must be designed to promote the general good, not to impose unequal or unnecessary restrictions on one limited class without providing a benefit for the public at large.

A similar ordinance requiring cyclists to wear helmets was declared unconstitutional by a New York court in People v. Carmichael, 279 N.Y.S.2d 272, 53 Misc. 2d 584. In that case the Court concluded, as have we, that an individual cannot be required to protect his well-being if his conduct affects only him. The New York court suggested that if the helmet ordinance was not a deprivation of personal liberty, perhaps the State might next have the power to ban smoking or to require all citizens to retire at 10 p.m. as a measure to protect their individual well-being. We thought the point was well taken.

Having concluded the ordinance is unconstitutional, we must next determine what relief is available to plaintiffs.

In our opinion plaintiffs may not invoke the equitable powers of our civil courts to enjoin enforcement of the ordinance because the law under attack is a penal ordinance. For injunctive relief in the instant case, plaintiffs must establish that the ordinance is unconstitutional, that a property right has been invaded and that plaintiffs will suffer irreparable injury. (See Olan Mills, Inc. of Tennessee v. City of Bogalusa, 225 La. 648, 73 So.2d 791, 798.)

From our review of the evidence we conclude plaintiffs failed to prove enforcement of the helmet ordinance will cause or has caused irreparable injury.

Plaintiffs allege the helmets obscure vision and hearing, thus creating a hazard to the cyclist. Richard Garrett, the plaintiff who operates a motorcycle sales and service business, stated that only the competition helmet affects the cyclist vision and hearing. He asserted the half helmet does not cover the ears nor obstruct the cyclist's vision and meets the standards set forth in the ordinance.

Plaintiffs allege the helmets are a health hazard. Betty White testified that she fainted while wearing a helmet, attributing her seizure to the helmet. On cross-examination it was developed that she rode on a motorcycle approximately five times a week and had worn a helmet since the ordinance was in effect. She only fainted one time. She conceded she fainted on another occasion while not wearing a helmet. We hardly think her testimony supports the conclusion that wearing a helmet induces fainting spells.

Plaintiffs further assert the expense of the helmet is oppressive and plaintiffs are injured because they are unable to buy helmets. Helmets may be purchased within the $10 to $69 price range. One plaintiff claiming economic hardship owns two motorcycles but cannot afford a helmet. Another, whose fourteen year old son rides a motorcycle, claimed she could not afford a helmet and her greatest fear connected with her son's riding is that he will lose his helmet and she will not

be able to replace it. (Presumably she can afford gas and maintenance on a motorcycle.)

This sampling of the evidence reflects the entire tenor of testimony adduced on plaintiffs' behalf, and we are unable to conclude therefrom that plaintiffs face irreparable injury.

In our view the trial court correctly decided the civil court has no jurisdiction to grant an injunction and that the appropriate remedy was a declaratory judgment. This form of procedure is authorized by LSA-C.C.P. Art 1872 which states:

> "A person ** whose rights ** are affected by ** a municipal ordinance ** may have determined any question of construction or validity, arising under the ordinance *** and obtain a declaration of rights, status or other legal relations thereunder."

In the Olan Mills case, cited *supra,* the Supreme Court in withholding injunctive relief through civil proceedings commented parenthetically that declaratory judgment would have been an appropriate civil remedy.

For the reasons assigned the judgment maintaining the declinatory exception and withholding injunctive relief is affirmed and the declaratory judgment issued maintaining the constitutionality of the helmet ordinance is reversed, and it is now declared by this Court that Ordinance 3536, M.C.S. Sections 38-228.1 (c), 38-228.2 and 38-231 (f) Item No. 94 is unconstitutional.

AFFIRMED IN PART;
REVERSED IN PART;
AND RENDERED.

COURT OF APPEAL — FOURTH CIRCUIT
STATE OF LOUISIANA, No. 2977

WILLIAM EVERHARDT, ARNOLD ECKLAND,
RUSSELL E. GARRETT, DOROTHY HAYES, and
GREATER NEW ORLEANS
MOTORCYCLE ASSOCIATION
VS
CITY OF NEW ORLEANS, VICTOR H. SCHIRO,
AND JOSEPH GIARRUSSO

JANVIER, J., concurring

I offer this short concurrence merely to stress the fact that this record contains not one word which indicates that the safety of the general public is to the slightest extent favorably affected by the wearing of helmets by motorcycle drivers. In fact, the record indicates the contrary; that to some slight extent the hearing and the sight of such an operator may be adversely affected by such a helmet and thus the damage to the public increased. Accordingly, the right of the motorcycle driver to wear such headgear as pleases him is denied him without any resulting benefit to the public generally.

(____ La., ____, 217 S.2d 400)

SUPREME COURT OF LOUISIANA

Monday, Dec. 16, 1968

WILLIAM EVERHARDT, ET AL

v. No. 49,257

City of New Orleans, Victor H. Schiro, and Joseph Giarrusso

In re: City of New Orleans, Victor H. Schiro and Joseph Giarrusso, applying for a Writ of Certiorari to the Court of Appeal for the Fourth Circuit

FOURNET, Chief Justice.

This is a class action instituted by plaintiffs,[1] respondents herein, seeking to enjoin the defendants,[2] relators herein, from enforcing Sections 39-228.1(c),[3] 38-288.2, 38-231(f) of Ordinance No. 3526 M.C.S., amending Ordinance 828 M.C.S., the Code of the City of New Orleans, and the matter is now before us on a writ of certiorari granted to the application of relators, 250 La. 269, 210 So. 2d 508, to review the judgment of the

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[1]Plaintiffs are William Everhardt, Arnold Eckland, Russell E. Garrett, Dorothy Hayes as Tutrix of Edward Hayes, and Greater New Orleans Motorcycle Association.

[2]Defendants are the City of New Orleans, Victor H. Schiro, mayor, and Joseph Giarrusso, Superintendent of Police.

[3]"Headgear: No person shall operate or ride upon any motorcycle or any motor driven cycle unless such person is equipped with and wearing on the head, a safety helmet of the type and design manufactured for use by the operators of such vehicles, which shall be properly secured with a chin strap while the vehicle is in motion. All safety helmets shall consists of lining, padding and chin strap. * * * "

Court of Appeal for the Fourth Circuit, reversing the judgment of the district court maintaining the constitutionality of the ordinance and declaring the same to be constitutional. 208 So. 2d 423.

The court of appeal, relying on the general principal of law of the police power of the state to promote the public convenience or the general prosperity as well as those to promote public safety, health and morals, observed, "The only function of the helmet requirement we are able to discern is to minimize the extent of injury to the individual cyclist involved in an accident, and not to contribute to the safety of the motoring public at large. Thus, we are concerned with a limitation of the personal liberty of the individual motorcyclist.", and concluded, "The helmet ordinance constitutes a denial of due process of law to plaintiffs in that it deprives them of an individual liberty without promoting a purpose beneficial to the public at large." The court also held, "The ordinance * * * denies plaintiffs the equal protection of laws in that it imposes undue restriction on one class of motoring public without any salutary effect to the public at large."

In order to properly resolve this case we think it first necessary to consider the well recognized rule of law that an ordinance, like any act of the legislature, is presumed to be constitutional. As aptly observed by this court in Schwegmann Bros. v. Louisiana A.B.C. Board, 216 La. 148, 43 So. 2d 248, "It is elementary that an act of the Legislature is presumed to be legal, and the judiciary is without the right to declare it unconstitutional unless that is manifest. This rule is strict-

ly observed in cases involving laws enacted in the exercise of the state's police power. * * *" See, Banjavich v. Louisiana Licensing Bd. for Marine Divers, 237 La. 467, 111 So. 2d 505; Plizzi v. Lotz, 240 La. 929, 125 So. 2d 146. Furthermore, the legislation is to be upheld if any set of facts can be conceived from which it could be concluded that there is a reasonable relationship between the law and the public good and safety. City of Shreveport v. Cunningham, 190 La. 481, 182 So. 649; City of New Orleans v. LeBlanc, 139 La. 113, 71 So. 248; Rast v. Van Deman & Lewis Co., 240 U.S. 342. 36 S.Ct 370, 10 L.Ed 679. Consequently, the one who attacks the constitutionality of a statute has the burden of establishing by clear and cogent evidence that the statute under attack is unconstitutional. Reynolds v. Louisiana Bd. of Alcoholic Beverage Control, 248 La. 629, 181 So. 2d 377; Kansas City Southern Railway Co. v. Reily, 242 La. 235, 135 So. 2d 915; Interstate Oil Pipe Line Co. v. Guilbeau, 217 La. 160, 46 So. 2d 113.

The City of New Orleans under its home rule charter granted it by the State was delegated all of the police power necessary for the protection of life, safety, health, and morals of the citizens as well as to promote public convenience and the general prosperity; and clearly, under this comes the power to regulate traffic on the highways and streets. Moreover, driving upon public streets and highways is a privilege and not a right; and, in the field of public safety the council should have more latitude in regulating individual conduct. See, People v. Schmidt, 283 N.Y.S.2d 290.

The ordinance in question is similar to the state statute, R.S. 32:190,[4] which was adopted by the Legislature in the 1968 Regular Session to conform to the Highway Safety Program standards promulgated by the Secretary of the United States Department of Transportation wherein it is provided insofar as pertinent here: "Each State shall have a motorcycle safety program * * *. 1. The program shall provide as a minimum that: * * * B. Each motorcycle operator wear an approved safety helmet and eye protection when he is operating his vehicle on streets and highways."

Our attention has been called to three decisions of courts of other states that have passed upon similar type of helmet laws. The first is a decision of the Court of Appeals of Michigan, Division 2, dated April 20, 1968 in the matter of American Motorcycle Association v. Davids, 158 N.W.2d 72, in which the helmet law of that state was held unconstitutional; second is a decision of the Supreme Court of Rhode Island, dated May 8, 1968, in the matter of State ex rel Colvin v. Lombardi,

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[4]R.S. 32:190 - "No person shall operate or ride upon any motorcycle or any motor driven cycle unless said person is equipped with and is wearing on the head a safety helmet of the type and design manufactured for use by operators of such vehicles, which shall be secured properly with a chin strap while the vehicle is in motion. All such safety helmets shall consist of lining, padding, visor and chin strap and shall meet such other specifications as shall be established by the Director of Public Safety. The director may contact with the American Association of Motor Vehicle Administrators for conducting of testing procedures and may approve for use those helmets submitted by manufacturers of motorcycle helmets and approved by said association. If the director finds that any helmet so approved meets the specifications fixed by or under authority of this section he shall issue notice of approval of the helmet."

241 A.2d 625, in which the helmet law of Rhode Island was held constitutional; and the third is a decision of the Supreme Judicial Court of Massachusetts, dated June 5, 1968, in the matter of Commonwealth v. Howie, 238 N.E.2d 373, in which a similar statute was held as a valid exercise of the police power.

In the latter case the Supreme Judicial Court of Massachusetts in upholding the statute, General Laws c. 90§7, requiring "every person operating or riding a motorcycle to wear protective headgear conforming with certain minimum standards" declared, "It lies within the power of the Legislature to adopt reasonable measures for the promotion of safety upon public ways in the interests of motorcyclists and others who may use them. * * * The act of the Legislature bears a real and substantial relation to the public health and general welfare and is, thus, a valid exercise of the police power. * * * As contended by the Commonwealth, "[t]he legislation is reasonable, applies to all equally and is directly related to highway safety," commenting, "a recent Michigan decision to the contrary is not persuasive. On this general subject we find ourselves in agreement with State ex rel Colvin v. Lombardi, * * *."

The Supreme Court of Rhode Island in the Lombardi case declared:

> "* * * It is our unqualified judgment that the purpose sought to be achieved by requiring cyclists to wear protective headgear clearly qualified as a proper subject for legislation.

"The defendant's contention to the contrary presupposes that protection for the motorcycle operator was the sole motivation for the general assembly's action. Even if this were so, we are not persuaded that the legislature is powerless to prohibit individuals from pursuing a course of conduct which could conceivably result in their becoming public charges. Be that as it may, however, the requirement of protective headgear for the exposed operator bears a reasonable relationship to highway safety generally. It does not tax the intellect to comprehend that loose stones on the highway kicked up by passing vehicles, or fallen objects such as windblown tree branches, against which the operator of a closed vehicle has some protection, could so affect the operator of a motorcycle as to cause him momentarily to lose control and thus become a menace to other vehicles on the highways.

"It is fundamental that an act of the legislature commands judicial approval if on any reasonable view such act is designed and intended to protect the public health, safety and morals. * * *"

We have no hesitancy in concluding that Ordinance No. 3536 M.C.S., Sec. 39-228.1(c) is clearly within the police power of the city in regulating traffic on its streets and there is a reasonable relationship between the ordinance and the public good and safety. It promotes safety upon the streets and highways in

the interest of the motorcyclist as well as all others who may use them, applying to all cyclists equally.

The argument of counsel for plaintiffs that the ordinance violates the equal protection clause in that it singles out one portion of motor vehicle operators, is untenable. Counsel obviously fails to recognize that motorcycles are in a different category from other motor vehicles, constituting a greater traffic hazard on public streets than travel by automobile, truck or other enclosed vehicle, both in respect to the driver thereof as well as to operators of the other vehicles. The operator of a motorcycle has considerably less body protection than operators of enclosed vehicles and is more susceptible to be injured and cause other injuries. Thus, there is a reasonable basis for the requirement of headgear to motorcycle drivers as opposed to such requirements for automobile drivers or golf cart operators as contended by respondent.

Finally, the contention is made that the ordinance is vague and indefinite in that it does not set forth guidelines and specifications as to the type of helmet to be worn, claiming that there are many types manufactured.

Our appreciation of evidence in the record shows that while there are several competitive firms in the manufacture of motorcycle helmets there are only two types manufactured, i.e., a full coverage type worn in competition and a half shell helmet for non-competition riding. Unquestionably, the council in adopting the ordinance that the motorcycle driver is to wear "a safety

helmet of the type and design manufactured for use by the operators of such vehicles" were cognizant of the type manufactured for that purpose. Appropriate here we think is the observation of the Supreme Court of Rhode Island in the Lombardi case in resolving a similar issue, to-wit: "* * * the word 'helmet' becomes a word of art when it identifies with a specific use. Thus, police, fireman, or football helmets conform to known and approved standards and are not open to uncertainty of meaning or use."

For the reasons assigned the judgment of the Court of Appeal is reversed and the judgment of the district court is affirmed.

HAMITER, J., dissents with written reasons.

SUMMERS, J., dissents and joins in the reasons for dissent assigned by Mr. Justice Barham.

BARHAM, J., dissents with written reasons.

Supreme Court of Louisiana
No. 49,257

William Everhardt et al.
v.
City of New Orleans, Victor H. Schiro and
Joseph Giarrusso

HAMITER, Justice, dissenting.

I am in accord with the result reached by the Court of Appeal, it being that the Motorcycle Helmet Ordinance of the City of New Orleans is unconstitutional, null and void.

Supreme Court of Louisiana
No. 49257

William Everhardt et al.
versus
City of New Orleans, Victor H. Schiro, and
Joseph Giarrusso

BARHAM, J., Dissenting.

I recognize the principles of law enunciated in the majority opinion that legislation is presumed to be constitutional, that the City of New Orleans under its police power has authority to regulate traffic on its public ways and streets in order to promote public safety,

and that the city may make reasonable classifications in the drafting of ordinances to accomplish this purpose. I conclude, however, as did the Court of Appeal, that the only purpose which this ordinance serves is to minimize the injuries of operators and riders of motorcycles if they are involved in accidents. It is not designed to prevent accidents and is not, therefore, a public safety measure.

The conclusions which the majority has made to supply constitutionality to this ordinance are not supported by the sparse record, so it must be assumed that these conclusions are in the nature of judicial notice. The majority finds that the ordinance promotes *safety* in the interest of the motorcyclist as well as others. I cannot determine how the wearing of a helmet by a motorcyclist can be conducive to the safer operation of his motorcycle. He is as accident-prone with as without the helmet in regard both to himself and to other motorists. Certainly an unhelmeted motorcyclist presents no increased danger to the rest of the motoring public. The most that can be said to support the insistence upon the wearing of the helmets is my original conclusion that the helmet may mitigate the cyclist's injury after the fact, after the accident, after the breach of safety.

The majority also says that motorcycles constitute a greater traffic hazard "both in respect to the driver thereof as well as to operators of the other vehicles". On the contrary, it would appear that the size and weight of motorcycles make them as to others less hazardous than larger and more formidable vehicles.

Finally it is reasoned that because of less body protection motorcyclists are "more susceptible to be injured and cause other injuries". Only the assumption that they are more susceptible to injury has validity in my mind and then not to a certainty. The assumption that the motorcyclist's lack of body protection makes other highway users more likely to be injured appears to be without foundation or logic. I can find no basis for concluding that helmeting or even armouring our motorcyclists would cause fewer injuries to others.

The ordinance is simply an attempt to force one class of persons to mitigate or minimize their own injuries resulting from accident without regard to causation of the accident or general highway safety. Deducibly and logically the ordinance will force one class of individuals to protect themselves from their own harmful acts or omissions or from the harmful acts or omissions of others. Generally the police power cannot be exploited to require the individual to protect himself from the wrongful acts of others, and only in extraordinary circumstances may the governing authority interfere with, or prescribe regulations for, the activity of individuals which is not harmful to others.

The right of one to use his property as he chooses so long as his use does no harm to others is a natural liberty. Even when this right is exercised upon public thoroughfares, police regulation of it must serve an overriding public purpose. Police power is commensurate with, but *does not exceed,* the duty to provide for the *real* needs of the people in matters of health,

safety, and general welfare. The deprivation of individual liberty by legislation under the police power must accomplish in an appropriate manner the particular public necessity. It is not apparent on the face of this ordinance that the general public or those not included in this particular class will derive any benefit from its enforcement.

Reasonable classification is necessary and sometimes desirable. Motorcyclists are in fact, and may be in fact, placed in a distinct class so as to regulate their use of the streets and highways when the classification is for the safety, convenience, and general welfare of the public. However, this ordinance arbitrarily and unreasonably deprives the motorcyclist of individual liberty when the only purpose served is his self-protection and when other more numerous users of the streets who are similarly situated are not required to utilize devices and equipment which serve only to minimize their own injuries. This ordinance strikes at the heart of individual liberty — that is, the right to act and to use one's property when that action and that use harm no one else. In the face of the ordinance's obvious deprivation of the constitutional right of free action and use of property of a small and arbitrarily selected group there must be some showing of an overriding service to the public. Not even speculation totally outside the record, the briefs, and the arguments before us can possibly sustain a conclusion that a public purpose is being accomplished by this ordinance.

The ordinance is no doubt humane and even eminently sensible, but it is nonetheless unconstitutional. That

our citizens in almost unanimity think it foolhardy to ride a motorcycle without a protective helmet is not alone a criterion for defining the non-use of the helmet a crime. Although laws have been validly enacted to protect the legally incompetent from their own acts, some of the persons who disregard the most elementary forms of self-preservation are, unfortunately, not legal incompetents, but only fools; and

"* * * a fool must follow his natural bent
"(Even as you and I!)"

Observing no *public* harm in the acts sought to be controlled and no *public* good as a derivative of the ordinance, I conclude that the city has exceeded its police power and that the ordinance is unconstitutional. I therefore respectfully dissent.

SUPREME COURT OF THE STATE OF LOUISIANA

Clerk's Office, New Orleans, Jan. 20 1969

Dear Sir:

Rehearing was this day refused in the case entitled *Everhardt et al v. City of New Orleans et al*

No. 49,257

Cordially yours,
V. J. COURVILLE, Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1284

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF LOUISIANA

WILLIAM EVERHARDT, ET AL.,
Appellant,

v.

CITY OF NEW ORLEANS, ET AL.,
Appellees.

BRIEF OF AMICUS CURIAE AMERICAN MOTORCYCLE ASSOCIATION

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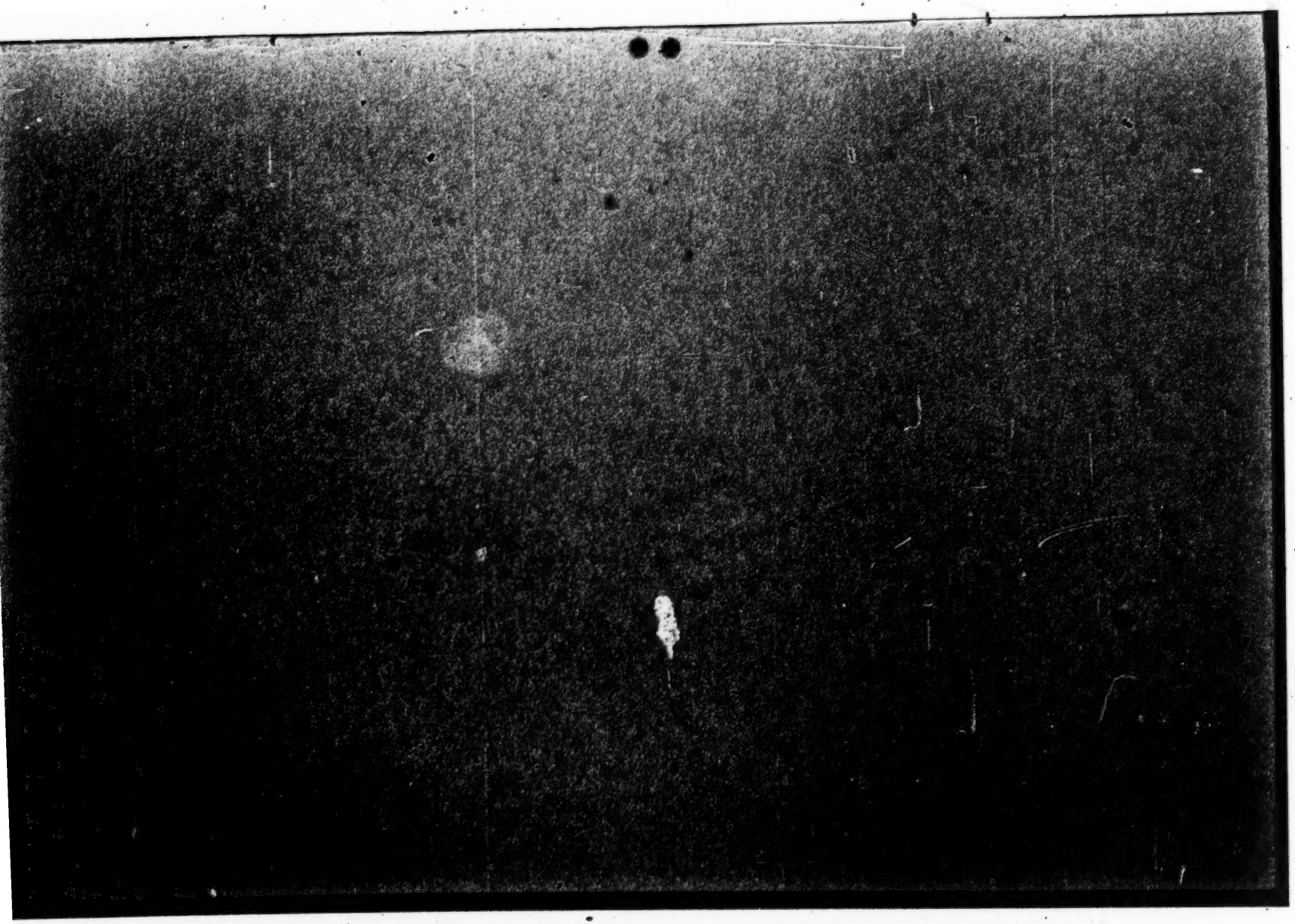

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ....

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF LOUISIANA

WILLIAM EVERHARDT, ET AL.,
Appellant,

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CITY OF NEW ORLEANS, ET AL.,
Appellees.

BRIEF OF AMICUS CURIAE AMERICAN MOTORCYCLE ASSOCIATION

By written consents of the Appellants and of the Appellees which are submitted herewith, the American Motorcycle Association files this brief as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The American Motorcycle Association is an organization of approximately 110,000 motorcycle riders from every state of the Union, banded together for the purpose, among others, of promoting safety in the operation of motorcycles. For the past several years, the American Motorcycle Association has studied the use of protective helmets but is aware that there is no unanimity of opinion regard-

ing the effect of the use of helmets in relation to the safety of operating a motorcycle. Many of the members of the American Motorcycle Association are of the opinion that the wearing of protective helmets actually impairs their ability to drive safely because it limits their field of vision or hearing, because it is hot and uncomfortable, and because it is itself distracting.

American Motorcycle Association has an interest in this appeal for the reason that cases involving the prosecution of its members for violations of compulsory motorcycle safety helmet statutes are pending in the appellate courts of at least five states.

For these reasons, as well as the belief of the Association and its members that compulsory safety helmet statutes constitute an unlawful infringement of a citizen's basic constitutional right of freedom to choose how best to provide for his own safety, the American Motorcycle Association submits that it is of great interest to the Association and its members that the Court accept jurisdiction and consider this matter on its merits.

I. THE SUDDEN PROLIFERATION OF STATUTES WHICH FORCE A LARGE SEGMENT OF THE MOTORING PUBLIC TO WEAR A DEVICE TO PROTECT THEMSELVES FROM INJURY IN THE EVENT OF ACCIDENT WHEN, IN THEIR JUDGMENT, THE DEVICE IS ITSELF LIKELY TO CAUSE AN ACCIDENT, MAKES THE CASE AT BAR OF GREAT NATIONAL INTEREST.

At the present time there are approximately 2,500,000 motorcycles registered in the United States. No doubt the total number of motorcycle riders and passengers, who are compelled to wear helmets by New Orleans City Ordinance 3536 and similar statutes, greatly exceed that number.

Spurred by the conditioning of the granting of federal highway aid upon the instituting of state safety programs, which must include a compulsory motorcycle safety helmet statute (The Highway Safety Act of 1966, 23 U.S.C. 402, 403), at least forty states have adopted such statutes. Most state statutes were adopted within the last two years.

The state statutes, like the New Orleans ordinance, compel motorcycle riders and passengers, under threat of criminal penalty, to wear approved safety helmets at all times.

In the torrent of litigation, both criminal prosecutions and declaratory judgment actions, which has followed the adoption of these statutes, four state supreme courts have found the statutes to be constitutional: Louisiana in *Everhardt v. City of New Orleans,* below; Massachusetts in *Commonwealth v. Howie,* ... Mass. ..., 238 N. E. 2d 373 (1968); cert. den. 21 L. Ed. 464 (1968); Rhode Island in *State v. Lombardi,* ... R.I. ..., 241 A. 2d 625 (1968); and Wisconsin in *Bisenius v. Karns,* ... Wis. ..., ... N.W. 2d ... (No. 157, decided March 7, 1969).

The state courts of appeal have reached conflicting results. A North Carolina court of appeals found the statute constitutional, *State v. Anderson,* 164 S.E. 2d 48 (N.C. App. 1968). A Louisiana court of appeals found the statute unconstitutional in *Everhardt v. City of New Orleans,* ... La. App. ..., 208 So. 2d 423 (4th Cir. 1968). A Michigan court of appeals found the statute unconstitutional, *American Motorcycle Ass'n. v. Davids,* 9 Mich. App. 655, 158 N.W. 2d 72 (1968), whereupon the state legislature adopted a new statute potentially more dangerous because, rather than requiring that the helmet be worn, it requires that the helmet be carried on the cycle.

At least two attorneys general have advised that their statutes are unconstitutional: Oklahoma, Opinion of At-

torney General No. 68-267 (Dec. 31, 1968); New Mexico, Opinion of Attorney General No. 66-15 (Feb. 1, 1966).

In addition to the above cases, your *amicus curiae* is aware of the trial of nineteen motorcycle helmet cases in ten additional states since 1967. In eight of these the trial court ruled the statutes unconstitutional. Thus, in summary, at the present time statutes compelling motorcycle riders to wear helmets have been ruled unconstitutional in Arizona, Florida, Michigan, Missouri, New Mexico, Oklahoma, and Washington.

As will be more fully explained in Part II below, the enactment of compulsory motorcycle helmet statutes raises crucial constitutional issues centering on the freedom of United States citizens to choose the best means to provide for their own safety. Furthermore, the uncontroverted testimony in the case at bar was that motorcycle helmets actually impair the ability of the driver to operate his vehicle safely due to restricting vision and hearing and the heat and annoyance of the helmets. Finally, there is a compelling need for a ruling by this Court to obtain national uniformity in regulation of traffic upon the highways of the country. For these reasons, it is earnestly submitted that the case at bar is of great and compelling national interest.

II. THE NEW ORLEANS MOTORCYCLE HELMET ORDINANCE CONSTITUTES AN UNCONSTITUTIONAL EXTENSION OF THE CITY'S POLICE POWER SO AS TO BE AN INVASION OF FUNDAMENTAL RIGHTS RESERVED TO THE INDIVIDUAL BY THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Compulsory motorcycle helmet statutes, such as the New Orleans ordinance, are enacted under the guise of government's police power; that is, the power of the city to enact highway regulations to provide for the safe travel of its citizenry. There is, in fact, no controversy in this case as to the standards to be applied in limiting the exercise of police power. A state's police power can be properly exercised only when there is a reasonable relationship to the *public* health, safety, morals, or welfare. 16 Am. Jur. 2d, Constitutional Law, Sec. 277.

What is at issue is the fundamental question of whether, in the case of motorcycle helmets, the city can compel an individual to wear a device which protects only the wearer, and the wearing of which does not promote the safety or welfare of any other member of society. Included in this question is the further issue of whether the right of privacy included in the guarantees of the first, fourth, fifth, and ninth amendments to the United States Constitution, and applied to the states through the due process clause of the fourteenth amendment, includes the right of a motorcyclist to choose the method of operating his cycle which best provides for his own safety, when that choice does not act in any way to endanger other users of the highways.

Courts holding compulsory helmet statutes constitutional have sought to find a link between wearing the helmets and the safety of others based upon the following rationale. First, there is some possibility, according to those courts, that a stone or bug could strike the unprotected head of a cyclist, thereby causing him to lose control and swerve into another vehicle, e.g. *State v. Lombardi,* supra. But there is no empirical evidence, or evidence in the record of this case, to support the hypothesis of those courts.

Even if bugs or flying stones were a danger, surely a compulsory windshield on the motorcycle is a more practical, constitutionally permissible alternative, as was suggested in *American Motorcycle Ass'n. v. Davids,* supra. Second, the courts raised the spectre of injured cyclists or their dependents becoming wards of the state, e.g. *State v. Lombardi,* 241 A. 2d 625, 627. Not even statutes which regulate the consumption of liquor have been justified upon such a basis. *The Boston Co. v. Massachusetts,* 97 U.S. 25 (1878). These statutes or ordinances cannot be justified on the ground that any person other than the wearer is protected thereby.

The case at bar involves a right, like the right to read what one pleases in his own home, *Stanley v. Georgia,* 37 U.S. L. Week 4315 (U.S. S. Ct., 1969), to be secure from unlawful searches, *Mapp v. Ohio,* 367 U.S. 643 (1961), to not have one's wire tapped, *Berger v. New York,* 388 U.S. 41 (1967), and to use contraceptives, *Griswold v. Connecticut,* 381 U.S. 479 (1965). At issue is the right of an individual to provide for his health and safety in the way he deems best.

Surely, of all powers of government, the police power must be exercised with most restraint. When that power is exercised to restrict fundamental rights of individuals, it *must* be subjected to scrutiny by this Court.

SUMMARY

By definition the exercise of the police power involves the restricting of individual freedom. Fundamental liberties, however, should not be so restricted without the scrutiny of the highest court of the land. This is particularly so when the restriction is without corresponding public benefit and when circumstances have bred conflicting re-

sults in the lower courts. For these reasons, the American Motorcycle Association respectfully requests that the Supreme Court accept jurisdiction and consider this matter on its merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1284

WILLIAM EVERHARDT, ARNOLD ECKLAND, RUSSELL E. GARRETT, DOROTHY HAYES as Tutrix of EDWARD HAYES and the GREATER NEW ORLEANS MOTORCYCLE ASSOCIATION,

Appellants,

versus

CITY OF NEW ORLEANS, VICTOR H. SCHIRO and JOSEPH GIARRUSSO,

Appellees.

On Appeal from the Supreme Court of the State of Louisiana

MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION AND BRIEF IN SUPPORT

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MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION AND BRIEF IN SUPPORT

NOW INTO COURT, through its counsel undersigned, comes the Appellees and move this Court to dismiss this appeal for want of a substantial federal question. The Appellants, in their jurisdictional statement, cite holdings by lower Courts in various states and two opinions of Attorneys General in support of their contention that there is here involved a substantial federal question.

Appellees in their attached brief will attempt to show that the Supreme Courts of the various states have unanimously upheld the constitutionality of a Motorcycle Helmet Law. In fact, the Supreme Court of Massachusetts in *Commonwealth vs. Howie,* 238 N.E. 2d. 373, specifically upheld such a statute, and, this court denied certiorari, ____ U.S. ____, 89 S.Ct. 485, 21 L.Ed.2d. 464, under the name of Howie vs. Massachusetts, No. 601, October Term 1968.

WHEREFORE, appellees move the Court to dismiss this appeal for want of a substantial federal question.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

The highest courts of the other states have passed on this type of helmet law in four other reported cases. In every instance, the statutes have been held to be constitutional. The first is a decision of the Supreme Court of Rhode Island, dated May 8, 1968, in the matter of *State ex rel. Colvin vs. Lombardi, 241 A.2d. 625,* in which the helmet law of Rhode Island was held constitutional. The second is a decision of the Supreme Judicial Court of Massachusetts, dated June 5, 1968, in the matter of *Commonwealth vs. Howie, 238 N.E.2d. 373,* in which a similar statute was upheld as a valid exercise of the police power. *In the latter case certiorari was denied by this court, U.S. , 89 S.Ct. 485, 21 L.ED.2d. 464 (1968).*

The third is *BISENIUS vs. KARNS,* dated March 7,

1969, 165 NW2d. 377, in which the Supreme Court of Wisconsin held the statute constitutional.

The fourth is *STATE OF NORTH CAROLINA vs. ANDERSON,* dated March 12, 1969, , 166 S.E.2d. 49, in which the Supreme Court of North Carolina held a similar statute constitutional.

The possibility of death and serious injury to cyclists and the general public is shown by the fact that the New Orleans Police Department records indicate that in 1966 there were *653 accidents* involving motorcycles, *468 resulting in injuries. Seven people were killed.* Not one of the fatalities wore a helmet at the time of the accident. These appalling statistics are borne out by national statistics compiled by the American Automobile Association. This study dated August 8, 1966, the first two pages of which are attached hereto as Appendix "A" show an increase in motorcycle registration from 575,080 in 1960 to 1,875,000 (estimated) in 1966. 300,000 foreign light-weights were sold in 1964. The death rate for 1965 was estimated at *1,500 persons.*

The point need not be labored that with this appalling accident rate on our roads and highways the drivers of other vehicles on the highway are necessarily exposed to the danger of becoming involved with these motorcycles which, when they go out of control and are involved in an accident, will necessarily endanger these other motorists on the road.

Recognizing the need for safety on our highways the Congress of the United States, on September 9, 1966 (Public Law 89-546; 30 Stat. 731) passed the High-

way Safety Act of 1966. Sec. 402 (a) and Sec. 402 (c) are most pertinent, particularly in requiring that "After December 31, 1968, the Secretary shall not apportion any funds under this subsection to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section". Pursuant to this Act, the Secretary in June of 1967 adopted a Highway Safety Program Standard for Motorcycle Safety, a copy of which is annexed hereto as Appendix "B". This program provides, at Page 2, as follows:

> "I The program shall provide as a minimum that: * * *
>
> "B Each motorcycle operator wears an approved safety helmet and eye protection when he is operating his vehicle on streets and highways."

The Congress and the agency authorized by Congress have required for safety on our highways that there be Motorcycle Helmet Laws; the Supreme Courts of all of the States that have reviewed their Motorcycle Helmet Laws have upheld them; and, finally, this Court in the *Howie* matter denied certiorari to review the holding by the Supreme Court of Massachusetts that its Motorcycle Helmet Law was constitutional. It is, therefore, respectfully submitted, that this appeal be dismissed for want of a substantial federal question.

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CERTIFICATE

I, the undersigned counsel, hereby certify that a copy of the above and foregoing motion and brief has been served upon Messrs. Michael O. Miranne and William F. Wessel, attorney of record for appellants, by mailing them a copy, in the United States Mails, postage prepaid, addressed to them at their office, 1605 National Bank of Commerce Building, New Orleans, Louisiana, 70112, and Mr. Elbert J. Kram, Attorney for amicus curiae, by mailing him a copy, in the United States Mails, postage prepaid, addressed to him at his office, 100 East Broad Street, Columbus, Ohio 43215.

_____

ALVIN J. LISKA

New Orleans, Louisiana
_____, 1969

APPENDIX "A"

Engineering & Safety Dept.

American Automobile Association
1712 G Street, N.W.
Washington, D. C. 20006

August 8, 1966

MOTORCYCLES AND THEIR OPERATION

1. *Introduction*

This report is prepared to meet the needs of persons seeking information on the great increase in the use of motorcycles in recent years. For the purpose of this discussion a motorcycle is considered to be any two or three wheeled motor vehicle. This includes what are commonly called heavy and light weight motorcycles, scooters, motor bikes and bicycles with motor attached. Information on this subject is very limited. Information that could be assembled is summarized in the following pages.

II. *Increase in Motorcycle Registration*

In recent years there has been a phenominal increase in registration, especially among the light weights. The following figures, are from "Highway Statistics", Bureau of Public Roads.

Year	*Motorcycle Registration*	*Increase over previous year*
1960	575,080	
1961	595,669	3.5%
1962	660,400	10.9
1963	786,318	19.0
1964	984,760	24.2
1965	1,380,726	40.0
1966	1,875,000 estimated by the American Motorcycle Association, Inc.	

The Motorcycle and Allied Trades Association reported sales of 335,000 in 1964 and 540,000 in 1965, or an increase of 60%.

Much of this increase is accounted for by the sale of foreign light weight motorcycles. The National Safety Council estimates that 300,000 of these light weights were sold in 1964.

An interesting study of student ownership was made in 1965 by Southern Illinois University, Carbondale, Illinois. The records of 1,685 students who registered their motorcycles with the University were analyzed. Of those registered 1,607 were men and 78 were women. Also 1,632 were single and 53 married.

The distribution by classes was as follows:

Freshmen	667
Sophomore	463
Junior	344
Senior	186
Graduated	25
Faculty	18

III. *Accident Records*

With increased motorcycle registration there has been an increase in motorcycle accidents. The following table, based on information from vital statistics of the U.S. Public Health Service summarizes the accident experience in recent years.

	Deaths of Motorcycle Riders		*Deaths of all Motor Vehicle Occupants*	
Year	*Number*	*Increase over previous year*	*Number*	*Increase over previous year*
1960	730		29,742	
1961	697	4.5%	29,866	0.4%
1962	759	8.9	32,311	8.2
1963	882	16.3	34,694	4.3
1964	1,118	26.8	37,960	9.4

There are no reliable figures available on mileage driven for motorcycles. The following table gives the deaths per 10,000 motorcycles in recent years.

Year	*Number of Motorcycles*	*Deaths*	*Deaths per 10,000 Motorcycles*
1960	575,080	730	12.7
1961	595,669	697	11.7
1962	660,400	759	11.5
1963	786,318	882	11.2
1964	984,760	1,118	11.3
1965	1,380,726	1,500 est.	10.9 est.

It is apparent that the rate has changed little in recent years despite the large number of *new* riders on the road. During the same period for all motor vehicles the deaths per 10,000 vehicles varied from 5.0 to 5.5, or about half that for motorcycles alone. It is quite obvious that once an accident occurs a motorcycle rider has far less protection and is more likely to be fatally injured than a person in a car.

Mileage death rates would be more meaningful but they would be largely guesswork since the mileage driven for motorcycles is not known.

APPENDIX "B"

U.S. DEPARTMENT OF TRANSPORTATION
Federal Highway Administration
National Highway Safety Bureau
Washington, D.C. 20591

June 1967

Highway Safety Program Standard

MOTORCYCLE SAFETY

INTRODUCTION

It is clear that there are many actions which can be taken to reduce significantly deaths and injuries from motorcycle accidents. Every State should have a program specifically related to motorcycle operation in-

cluding requirements for licensing, inspection and safety equipment.

BACKGROUND

Deaths and injuries from motorcycle accidents doubled between 1963 and 1965. This fact is particularly alarming when it is understood that most of those killed and injured were young people under the age of 25. Motorcycle registrations have jumped from 574,080 in 1960 to 1,914,700 in 1966. By 1970 the annual increase is expected to reach one million per year. Motorcycle safety takes on grave dimensions in view of the fact that since 1960 the rate of motorcycle fatalities has increased at about the same rate as the number of motorcycles.

PURPOSE

To assure that motorcycles, motorcycle operators and their passengers meet standards which contribute to safe operation and protection from injuries.

STANDARD

For the purposes of this standard a motorcycle is defined as any motordriven vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding tractors and vehicles on which the operator and passengers ride within an enclosed cab.

Each State shall have a motorcycle safety program to insure that only persons physically and mentally qualified will be licensed to operate a motorcycle; that

protective safety equipment for drivers and passengers will be worn; and that the motorcycle meets standards for safety equipment.

I. The program shall provide as a minimum that:

A. Each person who operates a motorcycle:

1. Passes an examination or reexamination designed especially for motorcycle operation.

2. Holds a license issued specifically for motorcycle use or a regular license endorsed for each purpose.

B. Each motorcycle operator wears an approved safety helmet and eye protection when he is operating his vehicle on streets and highways.

C. Each motorcycle passenger wears an approved safety helmet, and is provided with a seat and footrest.

D. Each motorcycle is equipped with a rearview mirror.

E. Each motorcycle is inspected at the time it is initially registered and at least annually

thereafter, or in accordance with the State's inspection requirements.*

II. The program shall be periodically evaluated by the State for its effectiveness in terms of reductions in accidents and their end results, and the National Highway Safety Bureau shall be provided with an evaluation summary.

*See Periodic Motor Vehicle Inspection standard

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

EVERHARDT ET AL. *v.* CITY OF NEW ORLEANS ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 1284. Decided May 26, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.